

LAW OFFICES
WEBSTER, CHAMBERLAIN & BEAN

1747 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006

(202) 785-9500

FAX: (202) 835-0243

ARTHUR L. HEROLD
ALAN P. DYE
EDWARD D. COLEMAN
KENT MASTERSON BROWN
BURKETT VAN KIRK
FRANK M. NORTHAM
JOHN W. HAZARD, JR.
CHARLES M. WATKINS
HUGH K. WEBSTER
DAVID P. GOCH
BRENNLEY LOCKE ELIAS
DAVID L. FINCH*

*NOT ADMITTED IN D.C.

GEORGE D. WEBSTER (1921-1996)
OF COUNSEL
J. COLEMAN BEAN
CHARLES E. CHAMBERLAIN

NOV 7 11 36 AM '97

November 7, 1997

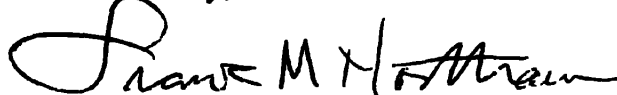
Dominique Dillenseger, Esq.
Office of the General Counsel
Federal Election Commission
Sixth Floor
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4012
Freedom's Heritage Forum and Frank G. Simon, M.D., as treasurer

Dear Ms. Dillenseger:

Enclosed is the original Designation of Counsel form for Freedom's Heritage Forum and Dr. Simon as well as three copies of their brief in response to the General Counsel's Brief. Ten copies of the brief also have been delivered to the Secretary of the Commission.

Sincerely,



Frank M. Northam

Enclosures
FMN/ctb

cc: Frank G. Simon, M.D.

28044203677

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Freedom's Heritage Forum and
Frank G. Simon, M.D., as Treasurer

)
)
)
)
)

MUR 4012

Nov 7 4 36 PM '97
FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

**RESPONDENTS' BRIEF IN OPPOSITION
TO THE GENERAL COUNSEL'S RECOMMENDATION
THAT THE COMMISSION FIND PROBABLE CAUSE**

Respondents, Freedom's Heritage Foundation and Frank G. Simon, M.D., file this brief in response to the General Counsel's Brief recommending a finding of probable cause.

The General Counsel contends that Freedom's Heritage Forum ("FHF") coordinated its activities with two candidates for federal office and that, as a result, FHF's independent expenditures in support of those candidates became in-kind contributions which exceeded the applicable contribution limits. The General Counsel's conclusion that there was coordination between FHF and the candidates is not based on any factual showing that there was any actual coordination or that FHF had been made aware of the plans, projects, or needs of the candidates. In the absence of such a showing, the Commission cannot approve a finding of probable cause.

COORDINATION ISSUES

In addressing the law applicable to the coordination issues, the General Counsel cites portions of the law and regulations referring to independent expenditures and coordination, as well as three advisory opinions. Astonishingly, the General Counsel makes no reference to the Supreme Court's recent decision in Colorado Republican Federal Campaign Committee v. FEC, ___ U.S. ___, 135 L.Ed.2d 795 (1996). In that case, the Court stated

28044203678

that there must be evidence of "actual coordination as a matter of fact" before coordination could become an issue to be examined.

The reason for the General Counsel's failure to cite Colorado Republicans is quite obvious. In MUR 4012, there is no evidence of "actual coordination" or "coordination in fact." Because there is no such evidence, the General Counsel relies on sheer conjecture and speculation to attempt to color the facts so as to establish that FHF had prior knowledge of the "plans, projects, or needs" of the candidates. By so coloring the facts, the General Counsel attempts to show that FHF can be presumed to have coordinated its activities under the independent expenditure regulations. 11 C.F.R. §109.1(b)(4).

Tim Hardy

A few examples of the General Counsel's mischaracterizations of the facts can demonstrate the overall fault in the General Counsel's brief. At page 5 of the brief, the General Counsel discusses the first occasion on which Dr. Simon met Tim Hardy. The General Counsel characterized the meeting as follows: "[The] information provided at the meeting conveyed to Dr. Simon that Hardy was serious about running, that Hardy's views were compatible with the Forum's and worthy of support, and that Hardy would need assistance with his campaign." The General Counsel follows this characterization with the unsupported conclusory statement that "Hardy himself communicated to Dr. Simon his plans, projects, and needs..." There is nothing in the General Counsel's version of the facts which establishes that Hardy discussed the "plans, projects, and needs" of his campaign. Nor could there have been since Hardy had not yet even decided whether to become a candidate.

At pages 6-7 of the brief, the General Counsel states that it "appears" that Dr. Simon recommended Bob Ross as treasurer for the Hardy campaign. Yet, the General Counsel's recitation of the facts establishes that no one could recall how Bob Ross became the campaign treasurer. Moreover, the General Counsel never alleges that Bob Ross ever communicated anything to FHF concerning the campaign. Therefore, how he came to be

28044203680

treasurer is irrelevant.

At page 8, the General Counsel discusses discrepancies in the recollections of Hardy and Dr. Simon as to how FHF obtained a photo of Hardy. The General Counsel concludes that these discrepancies "suggest" that Hardy and Dr. Simon did not want "to admit that they obtained the photo through coordination." This is representative of the General Counsel's leap to conclusions that have no factual basis. A difference in recollections is merely that and is "suggestive" of nothing. Additionally, the General Counsel has misused the term "coordination" in this section of the brief. Whether FHF requested a photo or the Hardy campaign voluntarily provided a photo is not indicative of "coordination" or any exchange of information as to the plans of Hardy or FHF.

The General Counsel engages in a lengthy discussion of the Candidates Night event that took place at the Swiss Hall on April 19, 1994. The General Counsel admits that other candidates were present for the event, although the General Counsel fails to admit that one federal candidate, other than Hardy, was present. Nevertheless, the General Counsel characterized the event as being focused solely on Hardy.

According to the General Counsel's own characterization, Hardy made a "speech about his position on pro-life and other issues and Hardy's request for support in getting elected." Notably the General Counsel does not claim that Hardy conveyed any information about the plans, projects, or needs of his campaign. A "request for support in getting elected" is not the kind of information that Congress intended to be construed as "a request or a suggestion" that would vitiate the independence of an independent expenditure.

Under the statute, an expenditure will not be deemed "independent" if it is made "at the request or suggestion of any candidate..." 2 U.S.C. §431(17). The definition of "at the suggestion of" in the statute was intended to cover direct suggestions. H.Rep. No. 917, 94th Cong., 2d Sess., 5 (1976). That House Report stated:

"if a candidate or some other person suggests in a speech to a group of persons that everything should be done to defeat the opponent of the candidate, it is not the intent of the Committee that such a reference in a speech be viewed as a 'suggestion' for purposes of the definition."

This section of the House Report was relied upon in Common Cause v. FEC, 655 F.Supp. 619, 624 (D.D.C. 1986), rev'd. on other grounds, 842 F.2d 436 (D.C. Cir. 1988), where the Court upheld the FEC's position that "evidence of direct coordination is the necessary prerequisite to a determination of impermissible coordination"--a position, unfortunately, that the General Counsel has failed to espouse in the present MUR, despite the teaching of Colorado Republicans.

Although Mr. Hardy's speech cannot be considered as evidence of coordination, the General Counsel contends that Hardy remained at the April 14 event during the time that Dr. Simon urged the attendees to participate in phone bank activities in support of pro-life candidates (including Hardy) and that, as a result, coordination occurred. The General Counsel argues that Hardy's presence "would clearly constitute coordination" even if Hardy had no prior knowledge of the nature of the event or of what FHF had planned to do at the event or in the future. The General Counsel fails, however, to point to any part of the statute or the regulations that would support such a contention.

The fact that a candidate may learn of an organization's anticipated independent expenditure activities (whether through attendance at the organization's multi-candidate events, receipt of information about the activities, or reading about the activities in the local press) clearly fails to establish evidence of "actual coordination" and also fails to raise the spectre of "presumed" coordination as set forth in the FEC's regulations. The FEC regulations at 11 C.F.R. §109.1(b)(4) purport to permit a presumption of coordination when the person intending to make an independent expenditure is aware of the "plans, projects, or needs" of a candidate. (The validity of those regulations is seriously in doubt following the decision in Colorado Republicans.).

28044203682

As noted previously, FHF had no prior knowledge of Hardy's campaign strategies and, thus, could not have coordinated its activities with his campaign. The underlying concept of the "presumed coordination" provision of the FEC regulations is that if both parties exchange information as to their strategies and plans, then it may be possible that they will coordinate their activities. That concept and the regulation, however, cannot be stretched to encompass the General Counsel's position that merely acquiring information as to what one party intends to do will automatically result in coordination. Were that the case, candidates and political committees would have to refrain from reading, listening to, or viewing media reports for fear that they might learn of the plans of each other.

Because there is no evidence of direct or indirect coordination between the Hardy campaign and FHF, the General Counsel's conclusion that Mr. Hardy's appearance at the April 14 Candidates Night event "would taint any subsequent expenditures by the Forum on behalf of Hardy" is clearly in error. Therefore, the General Counsel's discussion of the flyers distributed by FHF following that event are of no moment.

It should be noted, however, that the General Counsel characterizes some of those flyers as containing express advocacy, when the flyers do not. As to those flyers, the General Counsel's argument that incomplete disclaimers were included is in error.

The General Counsel also contends that FHF's alleged violations in connection with the Hardy campaign were "knowing and willful." Primarily, the General Counsel argues that this is so because of contradictions in testimony and because the investigation "revealed several instances of active collaboration..." (General Counsel's Brief at page 17). While there may be testimony that is contradictory, that is merely the result of differing recollections (and, in some instances, a lack of recollection) as to relatively insignificant events that occurred three years ago. It is not surprising that witnesses do not have the same recollection of events that occurred so long ago and that were of no significant import to them at the time.

28044203683

The General Counsel's assertion that there were "several instances of active collaboration" is merely another example of a mischaracterization of the facts. As has been demonstrated above, even under the General Counsel's slanted presentation of the facts, there is no evidence of actual coordination and there is no evidence of the types of exchanges of information which would permit reliance on the presumption of coordination provisions contained in the statute and regulations.

Richard Lewis

As is true of the General Counsel's presentation of the facts relating to the Hardy Campaign, the General Counsel's presentation of facts relating to the Lewis Campaign is based on conjecture and speculation. The General Counsel fails to present the Commission with any evidence of actual coordination or any evidence that would justify a presumption of coordination.

At page 18-19 of the General Counsel's Brief there is a discussion of the first two meetings with Lewis in which Dr. Simon was a participant. At the first meeting, Dr. Simon and Lewis merely discussed issues. At the second meeting, Dr. Simon and others met with two individuals who were potential candidates to run against Susan Stokes. The General Counsel characterized this meeting as a "recruiting session for the Forum [that] provided Dr. Simon with more information on Lewis' plans, projects, and needs..." The General Counsel, while using the magic words "plans, projects, and needs," fails to provide any factual support for this statement. The speculative nature of the General Counsel's "factual findings" are demonstrated in the very next statement in which the General Counsel asserts: "This meeting also undoubtedly reinforced Lewis' view that he would have the Forum's endorsement and support in this race." How the General Counsel has divined the mindset of Mr. Lewis is not explained; nor does the general Counsel make reference to the fact that Dr. Simon denied making any commitment to Lewis.

The speculative nature of the General Counsel's "fact finding" is repeated on page 20. There, in discussing Lewis' circulation of petitions to get on the ballot, the General

Counsel states that: "Dr. Simon may have assisted in this effort as well." Again, the General Counsel offers no factual basis for this statement.

At pages 20-24 of the General Counsel's brief is a description of a Candidates Night event that was sponsored by FHF on September 27, 1994. While Lewis was one of the candidates present at that event, there were several other candidates. More importantly, Lewis testified that he had no prior knowledge of who was sponsoring the event or that tabloids prepared by FHF would be distributed at the event. In fact, Lewis testified that he would not have attended had he had such prior knowledge and that, following the event, he took steps to distance involvement with FHF by instructing his staff not to get involved in any distribution of FHF materials.

Hampered by this unfavorable fact pattern, the General Counsel argues that "the Forum's involvement with the Lewis campaign exhibited some of the same features as the involvement with the Hardy campaign." The General Counsel, however, is unable to provide any evidence that FHF had knowledge of Lewis' "plans, projects, and needs" or that FHF undertook its independent expenditure activities in actual or presumed coordination with the Lewis campaign.

Despite the lack of evidence of coordination in regard to the Lewis campaign, the General Counsel seeks a finding of a knowing and willful violation. In large part, the General Counsel relies upon an assertion that FHF "deliberately" misreported certain expenditures and failed to place appropriate disclaimers on tabloids that the General Counsel asserts expressly advocated the election of Lewis. As to the misreporting, amended reports have been filed with the FEC and Dr. Simon has stated that there were some mistakes made. As to the tabloids, the language and message of the tabloids do not constitute express advocacy since there is no explicit exhortation to vote for or against a clearly identified candidate. Therefore, there was no requirement that the tabloids contain any statement that they were authorized or not authorized by a candidate or a candidate's committee.

DISCLAIMER ISSUES

As has been noted above, many of the materials distributed in connection with the elections in which Hardy and Lewis were involved did not contain express advocacy and, therefore, did not violate any federal election laws. As to those materials that did contain express advocacy, their lack of an appropriate disclaimer certainly was not intentional. Rather, it resulted from FHF's unfamiliarity with and inability to determine the applicability of the FEC's arcane regulations governing the wording of disclaimers to be appended to documents, depending upon the content of the documents.

CONCLUSION

Other than reciting statutory and regulatory language and referring to three advisory opinions, the General Counsel never states the standard that applies in determining whether there has been impermissible coordination. The General Counsel's Brief, however, makes it clear that the standard that the General Counsel has applied in this MUR is one which presumes coordination if there has been contact of any sort between a candidate and a political committee which engages in independent expenditure activities. This standard does not comport with the "actual coordination" test embraced by the Supreme Court in Colorado Republicans or the now-suspect "presumed coordination" test contained in the FEC regulations. Under neither of those tests has the General Counsel been able to provide the Commission with a factually supportable basis for concluding that FHF engaged in any coordinated activities.

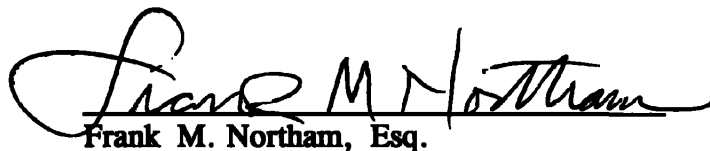
The General Counsel's request for a finding of knowing and willful conduct not only is factually insupportable but also demonstrates a callous attempt to bludgeon a relatively unsophisticated political committee into submission for fear of the power of a federal agency and its lawyers. The General Counsel's argument that FHF should have changed the wording of its disclaimers and the manner in which it reported expenditures, after having been advised of a complaint against it, is outrageous. In essence, the General Counsel is

28044203686

contending that a political committee can be found to have engaged in knowing and willful violations of the election laws anytime that it has received notice of a complaint concerning its activities and has not corrected the improprieties alleged in the complaint, even though there has been no administrative or judicial determination that the complaint's allegations have any validity. The General Counsel also seems to contend that a reason to believe finding by the Commission should serve as notice to a MUR respondent that its activities have violated the law and that it must take corrective action. The Commission is well aware of the fact that a "reason to believe" finding merely empowers the General Counsel to initiate an investigation and, in no way, indicates that the Commission has concluded that a violation of law has occurred. Were the Commission to accept the General Counsel's recommendation on "knowing and willful," then all future MUR respondents that become subject to "reason to believe" findings by the Commission will risk the threat of enhanced penalties for a "knowing and willful" violation even though there has been no administrative or judicial determination of the legality of their actions. This concept of guilt prior to conviction must not be entertained by the Commission.

For the foregoing reasons, the Commission should find no probable cause to believe that Freedom's Heritage Forum and Frank G. Simon, as treasurer, violated federal election laws.

Respectfully submitted,



Frank M. Northam, Esq.

D.C. Bar No. 206110

Alan P. Dye

Webster, Chamberlain & Bean

1747 Pennsylvania Avenue, N.W.

Suite 1000

Washington, D.C. 20006

Tel. (202) 785-9500

Fax (202) 835-0243

ATTORNEYS FOR
FREEDOM'S HERITAGE FORUM
AND FRANK G. SIMON

STATEMENT OF DESIGNATION OF COUNSEL

MUR 4012

NAME OF COUNSEL: Webster, Chamberlain + Bean

ADDRESS: 1747 Pennsylvania Ave, N.W., Suite 1000
Washington, D.C. 20006

TELEPHONE: (202) 785-9500

The above-named individual is hereby designated as my
counsel and is authorized to receive any notifications and other
communications from the Commission and to act on my behalf
before the Commission.

10/21/97
Date

Frank G. Simon / Freedom's
Signature Heritage
Forum

RESPONDENT'S NAME: Frank G. Simon / Freedom's Heritage Forum

ADDRESS: PO Box 6418
Louisville, Ky. 40206

TELEPHONE: HOME _____

BUSINESS (502) 895-5088

28044203687